

JULIE A. PETERSON ET AL.

IBLA 84-926

Decided april 15, 1985

Consolidated appeals from the decision of the Salt Lake City District Office of the Bureau of Land Management rejecting nine petition/applications for desert land entries U-015483 through U-015491.

Set aside and remanded.

1. Administrative Procedure: Adjudication--Bureau of Land Management--Desert Land Entry: Water Right--Evidence: Generally

It is premature for the Bureau of Land Management to reject petition/applications for desert land entries merely on the basis of informal information and belief that the State water authority will probably deny the applicants' the right to appropriate groundwater for irrigation of the entries where the water authority has taken no official action on the water applications pending before it.

APPEARANCES: Julie A. Peterson and each other appellant pro se. (See Appendix.)

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Julie A. Peterson and eight others each filed petition/applications for individual desert land entries in the area of Park Valley, Utah. Each indicated that he or she intended to irrigate the entry by utilizing groundwater produced from wells to be drilled for this purpose. These petition/applications were filed with the Salt Lake City, Utah, District Office of the Bureau of Land Management (BLM).

Subsequently BLM advised each applicant that it would be necessary for them to provide evidence of compliance with 43 CFR 2521.2(d) which, in pertinent part, reads as follows:

(d) Evidence of water rights required with application.

No desert-land application will be allowed unless accompanied by evidence satisfactorily showing either that the intending

entryman has already acquired by appropriation, purchase, or contract a right to the permanent use of sufficient water to irrigate and reclaim all of the irrigable portion of the land sought, or that he has initiated and prosecuted, as far as then possible, appropriate steps looking to the acquisition of such a right, or, in States where no permit or right to appropriate water is granted until the land embraced within the application is classified as suitable for desert-land entry is allowed, a showing that the applicant is otherwise qualified under State law to secure such permit or right.
 * * *. [Emphasis added.]

In response, the applicants submitted evidence showing that they each had made formal application to the State Engineer to sink the necessary wells and to appropriate the required amounts of water. These water-right applications had been assigned the official State numbers, and notices had been duly published in the local newspaper. No official action on these water-right applications had been taken by the State.

Subsequently, the BLM adjudicator who was processing the desert land entry applications had a series of contacts with personnel of the State Department of Natural Resources, Division of Water Rights. These included exchanges of correspondence, telephone conversations and personal meetings, which were described in memoranda to the files.

The information thus elicited concerned the number of Park Valley area water-right applications then pending before the Water Rights Division, their status and priority, the procedures followed by the State in handling them, and a prognosis of their eventual disposition.

Based upon the information so obtained, BLM prepared a draft decision captioned "Petition for Classification and Application Held for Rejection-Source of Water Required." The draft, addressed to Julie A. Peterson, states, in pertinent part:

On May 25, 1983, you filed desert land entry petition for classification and application U-51483. This application stated that a groundwater well would be the source of water to irrigate your intended entry. You do not have an approved permit from the Utah Division of Water Rights and will apparently be unable to obtain one.

The 1971 State of Utah, Department of Natural Resources Technical Publication No. 30, Hydrologic Reconnaissance of the Park Valley Area, Box Elder County, Utah stated that the estimated average annual water yield in the Park Valley area which can readily be diverted to man's use is 17,000 acre-feet. The Utah Division of Water Rights has estimated that the current withdrawal of water from the ground water area added to the 65.25 sec/ft. of water filings which predate and would be acted upon before the approval of your water filings is sufficient to use or would exceed this available underground water supply. Withdrawal of

the amount of water required to irrigate the Desert land entries would result in gradual decline of the water reserves.

Federal Regulation 43 CFR 2430.5(e)(2) states:

"If it is determined that the irrigation of land otherwise suitable for entry would endanger the supply of adequate water for existing users or cause the dissipation of water reserves, such land will not be classified for entry."

The use of groundwater to irrigate your desert land entry would endanger the existing uses for the water reserve therefore your stated source of water is unacceptable. Your desert land entry application is deficient since it does not provide evidence that you will be able to provide a source of water as required by 43 CFR 2521.2(d).

You are allowed 30 days from the date of receipt of this decision in which to submit a showing and evidence of a source of water that is both permanent and sufficient to irrigate all the irrigable lands in your application. Failure to take action or to comply with this requirement within the 30 day period will result in the final rejection of your application and closure of your case file.

BLM then submitted the draft decision to the Utah State Engineer, who endorsed it with his handwritten comment, "I concur," and his signature. Conformed copies of the decision were then sent to each of the desert land entry applicants, who then filed identical notices of appeal and statements of reasons.

Appellants' contentions are, in essence: (1) that many of the applicants for water rights whose applications pre-date appellants' applications may not be approved for various reasons, and many of the others who have filed will not actually drill wells or withdraw water; (2) the water presently available and the reserve supply in the Park Valley area greatly exceeds the amount estimated by the 1971 study; (3) the withdrawal of water in the amounts applied for by appellants will not endanger the supply of water for existing users or cause the dissipation of water reserves; (4) the State has not denied their water-right applications and they intend to pursue the approval of those applications in the expectation that they will succeed in obtaining permits.

The filing of the notices of appeal operated to divest BLM of jurisdiction of these cases, and no further BLM action should have been taken on the subject matter of the appeals until jurisdiction was restored to BLM by final Board action dispositive of these appeals. Sierra Club, 57 IBLA 228 (1981). After the appeals were filed, the BLM adjudicator telephoned his contact at the Utah Division of Water Rights, told him of the specific contentions being made by appellants, and summarized the State official's responses in a memorandum which he incorporated into the administrative record before forwarding the record to this Board. While this procedure was not necessarily improper, he

failed to serve appellants with copies. As the memo constituted BLM's response to and rebuttal of appellants' statement of reasons, appellants should have been served copies pursuant to 43 CFR 4.22 and 4.414. Since this was not done, the memorandum must be regarded as an ex parte communication in violation of 43 CFR 4.27. However, rather than ordering completion of service and affording appellants an opportunity to respond, as we ordinarily would do, we will proceed to decision on the basis of our finding that the unserved memorandum is more supportive of appellants' case than detrimental to it. The memorandum recites the views of the State official as follows:

1. It is true that the applicants' underground water has not been denied at this point in time, but with the information that it has, the State does not foresee being able to approve their applications.
2. It is true that many of the water-rights applications which predate appellants' applications will not be granted. Not all of the 65.25 sec/ft of water applications in the Dove Creek area will be approved.
3. The State's April 1984 water study confirmed the findings of the 1971 study. The available water and reserves "are severely limited in the Park Valley area."
4. The State considers that allowance of appellants' applications would endanger the supply of adequate water for existing users or cause overuse of available water.
5. The State "does not foresee that the applicants will be successful in obtaining their water permits." It has not changed its attitude on these findings and it supports BLM's decisions.

BLM's decision is based upon conjecture by State water personnel concerning what their action will probably be with respect to the water-rights applications. By so anticipating the State's actions, BLM has, in effect, performed the State's adjudication for it by mooted the water-rights applications. This is the reverse of what the sequence of events should be. This Department's regulation is satisfied by a desert land applicant's showing "that he has initiated and prosecuted, as far as then possible, appropriate steps looking to the acquisition of such a [water] right." *Id.* These appellants have made such a showing, and their desert land entry applications are, at least facially, in compliance with the regulations. It is now up to the State to grant or deny their water permits in whole or in part. It is premature for BLM to reject their petition/applications merely on reports from State personnel that they do not "foresee" that any of the applicants will receive permits. If the State has decided conclusively that it will deny each of these water permit applications entirely, BLM must await the State's formal, dispositive action implementing that decision. If, as seems to be the case here, the State personnel merely anticipate that their decisions on these water-right applications will probably be negative, it is error for BLM to pre-judge the desert land applications on the basis of such speculation.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are set aside and the cases remanded for further action consistent with this opinion.

Edward W. Stuebing
Administrative Judge

We concur:

Franklin D. Arness
Administrative Judge

Bruce R. Harris
Administrative Judge.

Decision U-51483, et al. (July 1984)
List of Petition/Applications

<u>BLM Number of Application</u>	<u>Name of Applicant</u>
U-51483	Julie A. Peterson
U-51484	Kevin Peterson
U-51485	Vickie F. Peterson
U-51486	Marlow H. Peterson
U-51487	Carla W. Peterson
U-51488	Hyrum D. Peterson
U-51489	Gertrude W. Tyler
U-51490	Mary D. Brown
U-51491	Lionel Brown

